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LABOR RELATIONS CONSIDERATIONS FOR THE NEW HIGH-TECHNOLOGY COMPANY

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Opening a new microchip company? Initial considerations tend to concentrate solely on construction, production and marketing. After all, that is where the money is made. But, where do personnel relations fit in?

One management consultant, reflecting on the way many businesses approach employment relations when opening a new plant, has said,

> "the typical course of events is for the home office executives to slap together an employee handbook from . . .[an existing] plant, invent some hiring rules (e.g. avoid employees with union backgrounds), conduct some wage surveys in the community, assign a plant manager (usually from an ongoing union plant), and arrange for a few foremen from an established plant to move to the new branch plant to start producing goods while training the local hourly workers and a few foremen hired from the community."[1]

His observations are pertinent to the opening of a new business, including a high-tech start-up. After all, in the last two decades, 195,000 new jobs have been created in the Silicon Valley's electronics and computer industries alone. The entrepreneur may think personnel relations is as simple as adopting a handbook from a former employer, hiring an operations chief and line supervisors from other firms, and merely expanding supervisory, production and support forces as the business develops. Because of the finite amount of planning time permitted executives today, personnel

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1. Jacobs, *Solidarity for a While*, NEW ENGLAND BUSINESS October 3, 1983, at 15.

needs are rarely given the consideration they deserve at the beginning of a company's development, and are too often treated perfunctorily. While times are good, businesses may be able to sidestep many personnel problems. But when a downturn occurs, the fissures along the fault lines may begin to open.

What should the founders of a high-tech company do? Develop personnel programs which foster a positive working environment *before* opening its doors for business. Failure to take such action early may result in a disgruntled and inefficient work force, high turnover, increased likelihood of union organizing and (particularly in California) costly litigation involving wrongful discharge claims. Conversely, a positive working environment lessens the likelihood that employees will turn to a third party, such as a union or government agency, to achieve job satisfaction.

Since high-tech companies have experienced extreme highs and lows in the past few years, a coordinated personnel program which fosters a positive working environment is particularly important. Employees who are willing to work with management can make the difference between a company's success and failure during the first turbulent years when the company is seeking its niche in a volitile market. Whether the cause is Japanese competition outselling Silicon Valley products in the market for mass-produced semiconducter microchips used in computer memories or artificially high expectations for personal computer sales, the market is drastically different from five years ago — and continues to change. A new company must be ready and able to react quickly.

This essay will discuss the legal and practical considerations necessary to develop an effective personnel relations program in a beginning high-tech company. By focusing on recurring problems, the authors hope that their suggestions will permit executives to analyze personnel concerns correctly at a crucial time in the company's and employees' development, and thereby to avoid the common mistakes made by many new businesses.

Although many of the recommendations suggested in this essay are relevant to unionized and union-free companies alike, we shall assume that, like most of his counterparts throughout industry, the new high-tech employer wishes to remain union-free. The reasons may vary. Some companies, now operating unionized plants elsewhere, desire to avoid problems such as contractual restraints on their freedom to make manufacturing changes. Some companies wish to avoid the duties arising under federal labor laws to notify and bargain with unions over certain management deci-

sions and their effects.[2] Others fear that unionization may result in protracted and expensive labor disputes, including litigation and strikes. Still others want to maintain an unimpaired right to deal with employees without having to deal with an adversarial intermediary. Fierce competition and rapidly changing technology may make control of business and personnel policies not merely desirable, but necessary.

As American industry becomes more and more dependent on high technology, the ability of a high-tech company to remain union- free will become more difficult. Organized labor has begun to target microprocessing plants, realizing that its future may "depend upon its ability to crack the, until now, solid nut of the high-tech industry."[3] Companies that develop comprehensive personnel programs are more likely to successfully parry that thrust.

We now consider the development of a sound employment relations program in each of its phases.

I. THE FIRST PHASE: SELECTING A SITE FOR YOUR NEW BUSINESS

A sound labor relations program - one that assures the acquisition of a loyal and satisfied workforce and is responsive to its needs — starts with site selection.

Many factors must be taken into account in selecting a community (and exact site) for the company. However, once financial considerations have been identified, and locations compatible with the Company's basic economic needs have been chosen, the prospective communities (and sites) should be judged in light of certain labor relation standards.

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2. In First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666 (1981), the United States Supreme Court held that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 679.

The National Labor Relations Board has interpreted the Court's mandate to mean that decisions involving a change in the scope and nature of a business are not mandatory subjects of bargaining. Otis Elevator, 269 N.L.R.B. No. 891 (1984) (holding that bargaining over a decision to close a facility and consolidate operations was not required). *See also* Garwood-Detroit Truck Equiptment, Inc., 274 N.L.R.B. No. 23, 1984-85 NLRB Dec. (CCH) ¶ 17,120 (1985). However, the employer is legally obligated to bargain over the *effects* of business decisions that have a substantial impact on bargaining unit employees. *See* Fibreboard Paper Products Corporation v. NLRB., 379 U.S. 203 (1964) (subcontracting). Effects bargaining may involve negotiations over severance pay, call back rights and accrued benefits.

3. Remarks of Woodruff Imberman, President of Imberman & DeForest, Inc., reported in *Sunbelt Branch Plants Found Ineffective As Method To Evade Union Organizing*, DAILY LAB. REP. (BNA) No. 191 at A-1 (October 2, 1985).

In the case of a high-tech company, the question of where to locate may be easy to answer: the Silicon Valley. However, the company must still determine (a) on which site to locate within the Silicon Valley community, and (b) what the company's legal obligations are in the Silicon Valley. The following four-step analysis should be completed to determine the impact of the decision, wherever the company chooses to locate.

A. *Step One: Review Applicable Laws*

Initially, the company should review federal, state and local labor laws.[4] For instance, are there burdensome safety and health requirements? Are the state minimum wage laws stricter than the federal statute? Are the benefits of locating in a right-to-work state very important? Do any local ordinances require investigation?[5]

Counsel should be able to obtain this information and offer an assessment.

B. *Step Two: Analyze Community Businesses*

Next, the Company should analyze other businesses in the community to determine the labor relations atmosphere, including:

(a) The number of unionized businesses in the area.
(b) The community's strike history.
(c) Whether any heavily unionized companies are planning to open a facility in the area; for example, has General Motors or another auto manufacturer decided, as you have, that this community is ideal for a new plant? General Motor's new plant probably will be unionized. The effects will be manifold. Not only will unions have a high degree of visibility that may affect newcomer's union-free status, but current area wage rates and

4. For example, California has comprehensive fair employment and labor codes. The California Fair Employment and Housing Act prohibits employment discrimination on the basis of race, religion, creed, color, national origin, ancestry, physical handicap, sex, age (with no upper limit), medical impairment or marital status. CAL. GOV'T CODE §§ 12926(f), 12940, and 12941 (West 1986). *Compare*, Civil Rights Act of 1964, prohibiting discrimination based on race, color, religion, sex or national origin. 42 U.S.C. § 2000(d) (1981).

5. For example, the cities of Los Angeles, San Francisco, West Hollywood and Hayward, California have enacted ordinances banning discrimination based on Acquired Immune Deficiency Syndrome, DAILY LAB. REP. (BNA) No. 160 at A-4 (Aug. 19, 1985). San Francisco has enacted an ordinance requiring developers to either provide on-site child care facilities or contribute to a special city fund. DAILY LAB. REP. (BNA) No. 171 at A-2 (Sept. 4, 1985). Also, an Administrative Law Judge for the California Unemployment Insurance Appeals Board has ruled that a man who voluntarily quit his job to care for his "family partner," who was dying of AIDS, is entitled to unemployment insurance because he had left work with "good cause." DAILY LAB. REP. (BNA) No. 208 at A-8 (Oct. 28, 1985). *See also infra* note 8 and accompanying text.

benefits (upon which the employer was depending) may rapidly escalate. The increase in available jobs may also deplete the labor pool.

(d) The identity of unions active in the area;[6]

(e) Whether there have been any recent organizing efforts in the area, and if so, what unions were involved,[7] and what issues are being stressed. Particularly in California, unions are raising health and safety issues, such as the use of video display terminals (VDT's), and comparable worth issues.[8]

(f) The community's attitude regarding unions. For example, members of a community which is, or was, located near a steel, mining or lumbering town may view employment as an ongoing struggle between employer and employee. Such an atmosphere is less conducive to positive employee relations.

C. *Step Three: Consider The Community's Labor Market*

Another consideration which may substantially impact on the location of a business is the nature of the labor market. Neither the

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6. The Bureau of National Affairs (BNA) publishes a Directory of U.S. Labor Organizations listing all national and international unions.

7. National and local newspapers are the most prolific sources of organizing information. Clipping services such as the American Trade Press Clipping Bureau (located at 5 Beeckman St., N.Y., N.Y.) and the International Press Clipping Bureau (located at 5 Beeckman St., N.Y., N.Y.) may be utilized.

The labor press is also an important source. Public libraries often have copies of union publications which are also available to the public by subscription. The Business and Economic Department of the Los Angeles Central Library, 630 W. 5th St., Los Angeles, Cal., houses union publications.

8. For example, in San Jose and Los Angeles, Cal., the American Federation of State, County and Municipal Employees ("AFSCME") has campaigned (through publicity, strikes and litigation) to achieve comparable pay for women workers. In San Jose, striking city workers accepted a $4.8 million wage offer from the city, including $1.45 million in raises for several hundred female employees paid less than men employed in comparable positions. At the time, Mayor Janet Gray Hayes said San Jose was the nation's first city to "document and address inequities that have traditionally existed between work performed by women even though job responsibilities and value, while different, are comparable." *The Comparable Worth Issue, A Special Report*, BNA (October 1981). However, in AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985), the United States Court of Appeals for the Ninth Circuit (in which California is located) reversed a district court ruling and unanimously rejected the comparable worth arguments brought by the union on behalf of female state employees. Noting that "the decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable," the court explained:

> . . .[N]either law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job. Other considerations may include the availability of workers willing to do the job and the effectiveness of collective bargaining in a particular industry.

770 F.2d at 1406-07.

company nor the employees will be content if a suitable work force cannot be obtained. Unions target companies which have disgruntled employees.[9] The following factors should be considered:

> (a) Community standards. Has a strong work ethic permeated the community?
> (b) The available employee pool. High-tech facilities are designed to utilize skilled employees. Is there a labor market, such as the Silicon Valley's, with these skills? If not, does your company have the financial resources and management manpower to train a competent work force? A company should look into the availability of government funded training programs.
> (c) The demographics of the potential workforce. If the new company will be bidding for government contracts, its officers should be aware that government contractors are subject to Office of Federal Contract Compliance Programs (OFCCP) regulations.[10] Affirmative action goals as well as the voluntary acquisition of a heterogeneous employee complement require a demographic study of the surrounding community.[11]
> (d) Wages and benefits. An in-depth area wide industry wage and benefit survey should be conducted to determine appropriate and competitive salary levels.
> (e) Community cost of living. For example, employees in the Silicon Valley generally are paid more, in part to compensate for the high priced housing market, where a modest home costs $125,000 and paying $250,000 for a home is not unusual.

The local Chambers of Commerce and trade associations often are sources of assistance that will facilitate learning about the community and the available labor market. Contacting these organizations during the initial stages of the site evaluation process is essential.

D. *Step Four: Determine the Exact Location for the Facility*

After the search has resulted in the selection of a community, a specific site must be chosen. An employee relations analysis of the site should then be made. At this final stage, the cost of the projected site must be weighed against other factors which will affect future employees. For example, a site located on a back country road may have an attractive price tag, but its inaccessibility to pub-

9. LEWIS AND KRUPMAN, WINNING NLRB ELECTIONS: MANAGEMENT'S STRATEGY AND PREVENTIVE PROGRAMS, 27 (Practicing Law Institute 2d ed. 1979).

10. *See* Exec. Order No. 11246, 3 C.F.R. 12319 (1965), reprinted in 42 U.S.C. § 2000e (1981), which requires, *inter alia*, written affirmative action plans for federal contractors.

11. Relevant applicant pool statistics are also important to employment discrimination litigation. *See* Hazelwood School District v. United States, 433 U.S. 299 (1977).

lic transportation and its distance from stores, banks and off-premises eating facilities may have too many disadvantages for employees to justify its construction.

Since many high-tech businesses are clustered in industrial parks or clean industry zones, they often share advantages and disadvantages of location and employee amenities. The new company may wish to contact several local employers to draw on their experiences.

Potential difficulties may be alleviated by planning ahead. The company may consider programs such as company buses, on-site cafeterias, automatic check depositing or check cashing services and other services that take into account the personal needs of the employees. The new business which chooses a different locale should be prepared to weigh the effects this decision will have on its ability to hire and retain a satisfactory work force.[12] Further, unions traditionally seize upon the absence of such programs to gain adherents. Their "promise" of obtaining these benefits through collective bargaining is a powerful organizing tool.

II. THE SECOND PHASE: BUILDING A MANAGEMENT TEAM

A management team should be carefully selected, and immediately assigned, to coordinate opening the business. It would be helpful to hire managers who are experienced in labor relations at high-tech companies. Particularly in today's high-tech market, where 10,000 workers in the Silicon Valley electronics industry have lost their jobs in 1985 alone, a new company can learn from experienced managers how to avoid some of the problems encountered by other high-tech operations.

An integral member of the initial team is the employee relations "specialist". The specialist should be consulted as early as possible in choosing the exact site and designing the facility. He should get to know every person involved in the project to insure that the management team will appreciate the impact its many deci-

12. The physical layout of the facility also affects employee relations. Seemingly trivial concerns, such as the convenience of parking facilities, vending machines and coin changers, can be very important to employees. For example, much care should be taken when considering the location of a parking lot. The lot should be on the sheltered side of the facility, especially if the plant is located in a cold or windy area. The difference in the temperature between the north and south sides can be dramatic on a bitterly cold or blusterly day. A cold and uncomfortable walk from a car to a plant entrance will affect the physical and mental well-being of an employee. These considerations often involve no additional cost in plant overhead. Yet, they may go a long way toward establishing an atmosphere of sound employee relations conducive to efficient production.

sions will have on employee relations. If possible, the company should recruit the specialist from the surrounding community.

The company should seriously consider selecting a plant manager from the locality as well. A well respected area native can be extremely effective in dealing with local politicians and government agencies, business people and employees who come from a similar background and share many of the same concerns and values.

When hiring top executives and managers, the company may wish to utilize an employment agreement which contains: (a) an appropriate covenant not to compete (which is limited in geographic scope and duration), and (b) a confidentiality clause (which will protect trade secrets the new company develops).

The management team should design a comprehensive employee relations program similar to the one outlined below. Timing is crucial; the employer should decide upon a course of action which will be ready to implement upon solicitation of the first recruit. This will enhance the likelihood of consistent application of company policies and minimize the risk that an employee will be able to charge that he was unfairly treated.

The employee relations program should include the following:

(a) an employee handbook;[13]
(b) a comprehensive supervisor's manual;
(c) a structured orientation program (including a checklist of topics to cover during orientation);
(d) a detailed procedure for accepting applications and hiring applicants (including an appropriate application form);
(e) a carefully controlled interview format;
(f) a reference checklist;
(g) a payroll process (and appropriate forms);
(h) an evaluation procedure (and appropriate evaluation form);
(i) a complaint resolution procedure (and appropriate complaint form);
(j) a progressive disciplinary program (and appropriate form);
(k) a termination procedure (and appropriate forms);
(l) an exit interview process (and appropriate forms);
(m) a health and safety checklist;
(n) a leave process (and request form); and
(o) a vacation policy (and request form).[14]

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13. If improperly drafted, an employee handbook could be used as the basis for a lawsuit by a former employee who alleges that he was unjustly discharged. This problem is discussed *infra* Section VI. E. 2.

14. In developing appropriate forms, federal and state record-keeping laws should be checked. For example, the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201-219 (1978) requires that most records containing employee information be retained for three

All of this material should be carefully scrutinized to insure compliance with applicable employment laws. Further, supervisors should be trained in lawful, practical methods of maintaining union-free status, complying with equal employment opportunity laws, and improving personnel skills. Particularly (but by no means exclusively) in California, virtually any employment action an employer takes has a legal consequence.[15] Training in maintaining union-free status should include, among other topics:

(a) reasons why the company, its managers and employees want to remain union-free;

(b) how to maintain union-free status, such as by explaining to employees the legal significance of union authorization cards and what unions can and cannot do for their members;

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years. Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, requires that any personnel record or employment record having to do with hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, as well as selection for training or apprenticeship, be kept for six months from the making of the record or the taking of the personnel action involved, whichever occurs later. 42 U.S.C. §§ 2000(e), *et seq.* (1981). The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, requires that payroll records generally be kept for three years. 29 U.S.C. §§ 621-634 (1985). Since these and other labor laws contain record-keeping requirements which vary depending on the type of record, specific personnel action and topic area covered, all labor laws should be carefully reviewed before starting business. Generally, it may be easier to retain *all* records for a predetermined period of time, set by the longest of the record-keeping periods applicable to the company.

15. *See, e.g., supra* notes 4-5, and authority cited therein. *See also*:

(a) *Interviewing*: Title VII, the ADEA, the NLRA and other federal, state and local laws, such as California's Pre-Employment Inquiry Guidelines issued by the California Department of Fair Employment and Housing and the CAL. LAB. CODE, §§ 430-434 (West 1986) (provides that if an applicant is required to sign an application for employment, the application must be filed with the State Division of Labor Law Enforcement. Also, the applicant is entitled to a copy of the document upon request.);

(b) *Payroll*: Title VII, the Fair Labor Standards Act, the Equal Pay Act and other federal, state and local laws, including the California Equal Pay Act (CAL. LAB. CODE, DIV. 2, PART 4) (WEST 1986), and California comparable worth cases in Los Angeles and San Jose;

(c) *Evaluation forms*: Title VII, the ADEA, and other federal, state and local laws, such as the CAL. LAB. CODE §§ 1198.5 (a)-(e) (West 1986), as amended by Ch. 1220 L. 1983, effective January 1, 1984 (which permits employees to inspect their personnel files);

(d) *Termination forms*: Title VII, the ADEA, and other federal, state, and local laws. *See also* California Hospital Association v. Henning, 770 F.2d 856 (9th Cir. 1985) (California state law, which prevents forfeiture of vacation pay and requires paymant of a pro rata share of vacation pay when an employee is terminated, is not preempted by ERISA).

Labor counsel can assist the company in insuring compliance with applicable labor laws, as well as in training managers to understand and practically apply company policies in compliance with the law.

(c) management and employee rights under the National Labor Relations Act;
(d) how to react to union organizing; and
(e) how to respond to a union's demand for recognition.

The training in equal employment opportunity should include, among other topics:

(a) a description of and practical approaches to complying with applicable laws, including Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination In Employment Act, the Fair Labor Standards Act and State and local fair employment law;
(b) lawful and proper techniques for interviewing, disciplining, and evaluating employees;
(c) sexual harassment; and
(d) avoiding wrongful discharge suits.

The training in supervisory skills should include a discussion of the company policies and the conduct of workshops regarding:

(a) employee selection;
(b) employee orientation;
(c) evaluation of employees;
(d) employee discipline; and
(e) proper communication with employees.

Once the company's management team has been selected and trained, they can translate the company's philosophy into practice.

III. THE THIRD PHASE: TRANSLATING THE COMPANY PHILOSOPHY INTO PERSONNEL POLICIES AND PRACTICES

Well-developed personnel programs are designed to prevent problems, not just treat them after they arise. Although top management usually has some idea of the employee relations environment it wants to create, this concept must be distilled, articulated and molded into a concrete, workable program. For example, the company should avoid perpetuating old line "class distinctions." Eliminating arbitrary barriers can help join the ranks in pursuit of a common goal. Consider the following steps:

(1) Avoid creating executive parking lots.[16]
(2) Allow everyone (whether management or rank and file) to

16. Also, determine if handicap parking is provided.

enter the plant through the same entrance.[17]
(3) Do not establish executive restrooms or separate locker facilities.[18]
(4) Build one cafeteria large enough for everyone.[19]
(5) Consider eliminating time clocks.[20] Is it necessary to have hourly employees? If not, why not make all employees salaried?
(6) Locate the personnel office so that it is easily accessible.[21]

A. *The Importance of an Employee Handbook*

One way management communicates the company philosophy to employees is through its employee handbook. Used properly in conjunction with an orientation program, a handbook can explain the company's views, state clearly what is expected from each employee, and outline wages and benefits. In preparing the handbook, company officials are forced (in a constructive fashion) to articulate the company's philosophy and apply it by developing the company's working policies.

1. Include Wage and Benefit Plans

It is critical that wage and benefit plans be drafted carefully to comply with federal, state and local regulations.[22] For example, federal[23] and California[24] law require that employees of both sexes within the same facility receive equal pay for equal work. Thus, the

17. If accommodation is lacking for handicapped personnel or visitors, the company may need to install ramps, special doors, and restrooms to assist those using wheelchairs.

18. Also, ensure that employee restrooms and other areas fully comply with the federal and state Occupational Health and Safety Acts.

19. If the employer wishes to subsidize employee meals, he should consider the affect on an employee's base rate. *See* the Fair Labor Standards Act, Interpretive Bulletin, 29 C.F.R. § 785.19 (1985).

20. The federal wage-hour law does not require their use. Fair Labor Standards Act, Interpretive Bulletin, 29 C.F.R. § 785.48 (1985).

21. Employees may have a right to review their personnel files. For example, employees in California have such a right. *See supra* note 15.

22. For example, most people consider the Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (1985), to be a comprehensive remedial statute designed to protect working men and women by curing widespread weaknesses in the nation's private pension system. However, ERISA *also* applies to *any* "employee benefit plan" established or maintained by any employee or employee organization engaged in commerce or any industry or activity affecting commerce. 29 U.S.C. § 1003(a) (1985). Thus, a company's severence plans, for example, must comply with ERISA's reporting, disclosure and fiduciary responsibility requirements. 29 U.S.C. §§ 1101-1114 (1985). An employer who decided to deny severence pay benefits to certain employees under a corporate severence policy never communicated to employees could, as a matter of law, have acted in an arbitrary and capricious manner in violation of ERISA. *See, e.g.,* Blau v. Del Monte, 748 F.2d 1348 (9th Cir. 1985).

23. Equal Pay Act of 1963, as amended, 29 U.S.C. § 206 (1978).

employer must evaluate job duties on the basis of skill, effort, responsibility and working conditions to ensure that wage scales comport to equal pay requirements.[25] In California, an employer also must abide by the various wage orders and regulations promulgated by the State Department of Industrial Relations and the Industrial Welfare Commission.[26] These directions cover minimum wage rates, apprentice and learner rates, handicapped worker rates and minors' rates.[27] Of course, federal law must also be followed in developing wage and benefit plans.

2. Include the Company's Policy on Unions

Companies frequently inquire whether they can take a position on unions in their employee handbooks. The answer is yes, but the language of the statement must not interfere with employees' rights to organize, or it may be found to be an unfair labor practice under the National Labor Relations Act (NLRA).[28] The handbook may say that the employer is union-free, desires to remain so, and believes that this condition best serves the interests of employees.[29] It may explain the basis for this belief, but it should avoid suggesting to employees that they may not engage in organizational activity or that their jobs will be in jeopardy if they do.[30]

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24. California Equal Pay Act, CAL. LAB. CODE, Div. 2, Part 4, as amended by ch. 1 1982 (eff. January 1, 1983).

25. CAL. LAB. CODE § 1197.5 (a) (West 1986).

26. CAL. LAB. CODE § 70 (West 1986).

27. The following wage orders were adopted by the California Industrial Welfare Commission on Jan. 1, 1980, and are found in CAL. LAB. CODE, Div. 2, Part 4, ch.1.

(a)*Minimum wage* - $3.35 per hour;

(b) *Apprentice and learner rates* - at least 25% of minimum wage during first 160 hours of employment in occupations where there is no similar or related experience;

(c) *Handicapped worker's rates* - a special license is necessary to authorize the payment of subminimum wages to handicapped individuals;

(d) *Minor's rates* - 85% of minimum wage provided that the number of persons receiving the lesser rate does not exceed 25% of the number of those regularly employed.

28. Section 8(a)(1) of the National Labor Relations Act makes it unlawful for an employer to "interfere with, restrain or coerce" employees in the exercise of their rights guaranteed under section 7. 29 U.S.C. § 158(a)(1) (1973). Those rights include the right to engage in union activity. *See* 29 U.S.C. § 157 (1973). The National Labor Relations Board has held that an improperly worded statement on union activity in a handbook may violate § 8(a)(1).

29. The National Labor Relations Act "proceeds on the understanding that . . . the employer has a right commencing on the date of hire to convince his employees that union representation is not in their interest." Report by the House Education and Labor Commission on the Labor Reform Act of 1977 (H.R. 8410), D.L.R. Special Supp. 11 (Sept. 29, 1977) (BNA).

30. For a sample policy statement on unionization, *See* Lewis, Kaplan and Rosen, *Re-*

3. Include Solicitation and Distribution Rules

As a preventive measure, it is also advisable to include rules limiting solicitation and distribution of literature at the site.[31] A limit on solicitation will have a two-fold benefit. First, production will run with greater efficiency since solicitation for any cause distracts employees and disrupts work. Second, no-solicitation rules inhibit union advocates from organizing during work time.

It is important that an employer adopt no-solicitation rules at the inception of its business operations and enforce them consistently. If an employer waits for a union to appear on the scene before promulgating a no-solicitation rule, he may be found to have violated the NLRA by attempting to interfere with his employees' right to organize.[32] An employer should also be aware that restrictions on solicitation must apply to all kinds of solicitation. Bans on union solicitation alone are discriminatory and, therefore, unlawful.[33] Furthermore, solicitations for social events,[34] gambling activities,[35] and commercial products[36] have invalidated otherwise lawful no-solicitation rules.[37]

4. Include a Complaint Resolution Procedure

An internal grievance procedure should be established at the inception of a Company's operation. By setting up a formal mechanism for resolving issues *before they grow into major complaints*, problems may be identified, communicated and resolved expeditiously. The so called "open-door" approach is the most common

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sponding to Union Organizing Campaigns, Form 1, Matthew Bender & Co., *Business Law Monograph Series* No. 9 (1984).

31. Solicitation, under federal labor law, has been defined as activity in which employees orally seek support for a union through conversation or argument, or urge the signing of union authorization cards. Stoddard-Quick Mfg. Co., 138 N.L.R.B. 615 (1962).

32. W.H. Block Co., 150 N.L.R.B. 341 (1964).

33. Hammary Mfg. Corp., a Division of U.S. Industries, Inc., 265 N.L.R.B. 7 (1982).

34. *See* Harvey's Wagon Wheel, Inc. d/b/a Harvey's Resort Hotel, 236 N.L.R.B. 1670 (1978).

35. *See* PATCO, 261 N.L.R.B. 922 (1982); Publisher's Printing Corp., 233 N.L.R.B. 1070 (1977), *enforced* 625 F.2d 7461 (6th Cir. 1980).

36. PATCO, 261 N.L.R.B. 922 (1982).

37. An example of a lawful employee no-solicitation rule is:

> Solicitation by an employee of another employee is prohibited while either person is on working time.

An example of a lawful non-employee no-solicitation rule is:

> Solicitation, distribution of literature or trespassing by non-employees on company premises is prohibited at all times.

Lewis, Kaplan and Rosen, *Responding to Union Organizing Campaigns*, § 1.02[2], Matthew Bender & Co., *Business Law Monograph Series No.* 9 (1984).

procedure employed,[38] although some companies have grievance procedures that resemble those under collective bargaining agreements and may even contain provisions for binding arbitration.[39]

Many companies choose the optimum location, recruit the best people, and implement competitive benefits, wages and policies, only to find that all went for naught because an effective two-way communication system was never devised. A common denominator in many situations involving labor strife is the lack of meaningful communications between management and employees.

V. THE FOURTH PHASE: RECRUITING SUPERVISORY PERSONNEL

A. *Step One: Define the Supervisory Positions*

Supervisors are the most important link in the chain between upper management and rank and file employees. Therefore, the appropriate number of supervisors and levels of supervision need to be determined well before recruitment begins. Since supervisors are exempt from the provisions of the NLRA[40], an individual's supervisory status should be clearly defined to supervisors and the work force. The establishment of "lead people" should be discouraged, since too often they fall into the no-man's land between management and employees. As such, they cannot be requested, as supervisors can, to explain to employees during union organizing why the company wishes to remain union-free.[41]

B. *Step Two: Accurately Describe the Company's Expectations When Selecting Managers*

Since communication is the keystone of good employee rela-

38. FOULKES, PERSONNEL POLICIES IN LARGE NON-UNION COMPANIES, 300 (1980).

39. *Id.* at 299. Grievance or termination procedures outlined on personnel policy manuals may be contractually enforceable. *See* Wooley v. Hoffmann-LaRoache 99 N.J. 284, 491 A.2d 1257 (1985).

40. The NRLA, which expressly excludes "supervisors" from the protections accorded to "employees," 29 U.S.C. § 152(3) (1973), defines a supervisor as:

> . . .any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

National Labor Relations Act subch. II, 29 U.S.C. § 152(11) (1973).

41. *See, e.g.*, Detroit Edison Co. 275 N.L.R.B. No. 158, 1985-86 NLRB Dec. (CCH) ¶ 17,358 (1985); McEver Engineering 275 N.L.R.B. No. 128, 1985-86 NLRB Dec. (CCH) ¶ 17,362 (1985).

tions, those interviewing applicants for supervisory positions should clearly express the company's policies and ascertain that the prospective supervisor is also capable of expressing those policies. It is lawful to ask potential *supervisors* about their union sentiments since they are excluded from the NLRA and will be expected to support and instruct others on management's policies.[42] (It is *not* permissible to direct such inquiries to "rank and file" applicants or lead people.[43])

Nevertheless, sometimes a supervisor's true sentiments do not become known until union organizing arises and he or she is told to convey management's views on the subject. Can a supervisor be fired for refusing? Yes. Supervisors are excluded from the coverage of the NLRA because they owe undivided loyalty to their employers.[44] If they breach that duty, they may be disciplined or discharged. Only in rare circumstances, such as where supervisors are directed to violate the law, are their refusals protected, and then only because of the adverse effect their punishment would have on statutory employees.[45]

C. *Step Three: Before Operations Begin, Train Supervisors Who Are Hired*

Supervisors serve a dual purpose, as directors of production and as communicators of company policy. The management team responsible for opening the plant must decide whether to give production quota considerations more weight than leadership and interpersonal skills. Whatever the decision, one should not act to the exclusion of the other. Training can be provided to teach the skills which are lacking.

The role of the supervisor has undergone considerable change with the advent of high-technology and automated industry. As workers switch from being machine operators to programmers, the front-line supervisor assumes new characteristics. High-tech workers need information, continuous training, and coordination with other parts of the production process. The modern supervisor, like the IBM manager, needs to be a "teacher, an expediter and an

42. *Supra* note 27.

43. *See, e.g.*, Patsy Bee, Inc. v. N.L.R.B., 654 F.2d 515 (8th Cir. 1981); Hecla Mining v. N.L.R.B., 564 F.2d 309 (9th Cir. 1977); and N.L.R.B. v. General Tel. Directory Co., 602 F.2d 912 (9th Cir. 1979).

44. Florida Power and Light Co. v. IBEW, 417 U.S. 790 (1974).

45. Parker-Robb Chevrolet, Inc., 262 N.L.R.B. 402, 403 (1982). *See also* Talladega Cotton Factory, Inc., 106 N.L.R.B. 295 (1953), *enforced*, 213 F.2d 209, 215-17 (5th Cir. 1954).

assistant."[46]

A detailed plan for supervisory training is essential to establish an effective supervisory team. Seminars or workshops can be utilized with role playing and trainee participation. As previously described, topics for the training program may include "fair appraisal," "uniform handling of discipline," "effective employee communications," "equal employment opportunity laws" and "maintaining union-free status."

VI. THE FIFTH PHASE: RECRUITING EMPLOYEES

A. *Step One: Evaluate the Actual Job Requirements*

Before starting the employee recruitment phase of a new business, the management team must carefully evaluate its actual manpower requirements. High-tech jobs require specialized, skilled workers. The company must consider the mental, physical and emotional qualifications which are necessary for each particular job. It must recruit and hire the personnel needed to obtain the results it wants. The only way to insure a high degree of likelihood for success is to determine and project the operational needs immediately.

Some employers prepare written job descriptions for use by the recruiter. However, these descriptions can inhibit the flexibility which a new company needs to be successful. If particular job duties are not included in a description, managers and employees may be reluctant to assign them, and employees unwilling to undertake them. A better practice, in our view, is to outline job duties in general terms, and explain to the prospective employees that these tasks will be subject to change as the company gains experience.

B. *Step Two: Determine Appropriate Sources of Applicants*

Next, a thorough investigation of recruitment methods should be conducted in order for the management team to become familiar with local employment services, special programs (such as the Comprehensive Employment Training Act), private employment agencies, placement centers at local schools and referral services. This will facilitate the team's decision on how to recruit. Efforts should be made to ascertain the overall scope of the local employment services. Many provide valuable additional services such as training prospective employees.

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46. Drucker, *Twilight of the First-Line Supervisor?*, Wall St. J., June 7, 1983.

C. *Step Three: Determine the Type of Applicant the Company is Looking for*

A company also must pinpoint who is to be recruited. Defining the scope of the job market is an important pre-plant opening exercise. As previously mentioned, some companies, such as government contractors, need to establish affirmative action goals. Even voluntary plans aimed at achieving employee diversity require that the personnel team investigate the available labor market regarding sex, age and race. Further investigation will more than likely be necessary to effectuate the company's goals. It is possible that minority group members are concentrated in an area quite distant from the plant. The management team must decide if an effort will be made to solicit potential employees from that distant area.

An employer opening a new business must also keep in mind that it is unlawful to discriminate against union members in hiring. A leading case in this area involved the Joseph Magnin Company, which operates a chain of retail franchise stores in California, Nevada and Hawaii. When Magnin decided to open small Gucci stores, it established a separate division and opened its first San Francisco store on a nonunion basis. When Magnin's unionized employees sought to be transferred from the union to the non-union stores, they were refused unless they first resigned from the union. The National Labor Relations Board (NLRB) concluded that this practice violated the NLRA by discriminating against union employees.[47]

D. *Step Four: Select a Suitable Approach to the Interviewing Process*

Decisions must also be made as to the type of interviewing process to be used. The panel interview may be a viable alternative to the one-on-one interview for hiring certain important personnel. (It is unlikely that a new firm — or any firm — can devote such attention in hiring rank-and-file employees.) A panel may consist of a plant manager, a personnel recruiter and an immediate supervisor. Not only will this result in across-the-board participation in the employee selection process, but it will also give the applicant a cross-sectional view of the company at a very early stage. Subjects such as shift schedules, overtime requirements, wage structure and benefits (e.g., when entitlement begins, whether dependents are covered),

47. Joseph Magnin Co., Inc., 257 N.L.R.B. 656 (1981).

and transportation are explained and discussed at the pre-employment interviews.

Another alternative, developed by a Silicon Valley software company, is the use of computer systems to screen job applicants. This gives the recruiter a chance to obtain an employee evaluation that is more detailed than may be drawn from short job applications. Before being interviewed face to face, the applicant sits at a computer terminal and keys in answers to an average of 100 questions. The computer "interview", which lasts about 20 minutes, is designed to elicit answers tailored to the job description provided by the Company. The answers to computer programmed questions are reviewed before the applicant is interviewed. Points are given for answers that were often given by past successful employees at other companies, and points are deducted for responses given by employees who were unsatisfactory workers.[48]

The focus of any employment interview is to get to know the applicant. The applicant's qualifications may be revealed through the questions *they* ask as readily as by the answers they provide. Thus, interviewers should be trained in helpful techniques that comport with the law. A few "pointers" for interviewing include:

(a) Select a private setting for the interview. Avoid interruptions.

(b) Review with the applicant the questions asked on the application to insure accuracy and to answer any questions the applicant may have about the job.

(c) Use open-ended questions. Emphasis should be placed on listening. Avoid questions that require a yes or no answer. For example, instead of asking, "Did you enjoy your last job?" the recruiter should say: "Tell me about a project you worked on at your last job." The more you know about an applicant, the more intelligent and reasoned your employment decisions become.

(d) Inform the applicant of Company policies. Follow up by asking if he or she has any questions about the policies.

(e) Focus on "red flags," such as high turnover in employment, "overqualified" applicants, and unexplained "gaps" in the applicant's work history.

(f) If the applicant is underage, ask whether he/she has the necessary work permit.

(g) If the applicant is not a U.S. citizen, ask whether he/she has the legal right to work in this country.

(h) Explain that references will be checked, and inquire whether

48. A computer screening system was marketed and developed by Greentree Systems, Inc., *see* White Collar Report (BNA) Vol. 55, at 523 (May 2, 1984).

the applicant will get favorable references from former employers.

It is improper to ask:

(a) Will religion prevent you from working any schedule?
(b) How will you get to work? Do you own a car?
(c) Are you married? Do you have children? Who will care for your children while you are working?
(d) Do you own or rent your home?
(e) Have you ever had your wages garnished?
(f) What clubs do you belong to?
(g) Are you or have you ever been a union member?

The employer who wishes to remain union-free may be tempted to inquire about the applicant's union sentiments. We have already said this is unlawful. A closer question, but one that is still attended by risk, is whether the applicant's prior place of employment was unionized. There is a better — and safer — way to attract employees who will be happy in a nonunion setting. Don't ask them about their old employer; tell them about their new one. State that the company is union-free, that (in the employer's view) this is the preferred means of operating, and that you hope the employee would be comfortable in that environment. However, applicants must be made to understand that their reaction to the question will not be determinative of their selection.

E. *Additional Problems To Consider When Recruiting*

1. The Filing of a Premature Petition for Representation

Unionization during a business start-up poses a particular problem. A bare majority of a small number of original employees may determine the representational status of what ultimately is a much larger work force. The NLRB has established a rule that in order to conduct a representation election, the present segment must be "substantial and representative" of the projected employee complement.[49] The board generally considers:

(a) the size of the existing employee complement;
(b) whether the projected additional positions will be in the same or different classifications;
(c) the rate of expansion; and

49. K-P Hydrolics Company, 219 N.L.R.B. 138 (1975); General Cable Corp, 173 N.L.R.B. 251 (1968). *See* Trailmobile, Division of Pullman, Inc., 221 N.L.R.B. 954 (1975); Endicott Johnson de Puerto Rico, Inc., 172 N.L.R.B. 1676 (1968).

(d) whether the projected plans appear to be concrete (e.g., previously determined and scheduled to take place within the next twelve months) or speculative.

Since the Board determines the outcome of representation elections on the basis of a majority of valid votes cast, rather than a majority of all eligible voters, a mere fragment of the eventual unit population can decide the issue of unionization. Thus, it is essential that the new employer not only be able to determine at what point a growing work force becomes "representative" of the final grouping, but also make sure that the original cadre is selected so as to avoid malcontents and that working conditions are established that will minimize the risk of dissatisfaction with working conditions.

2. Erosion of the "Employment-At-Will" Doctrine

In developing hiring and employment policies, the new employer must recognize the erosion of the "employment-at-will" doctrine.[50] No other issue in the employment area has generated as much controversy in recent years.[51] Traditionally, an employment relationship with no definite duration was deemed to be terminable "at-will". An employee could be discharged at any time for just cause, unjust cause or no cause.[52] However, recent legislative and judicial developments have created exceptions to the general rule.

For example, courts, in some states, have limited the employment-at-will doctrine by using three different contractual theories:

(1) Employers are required to abide by their written statements as if they were contained in a collective bargaining agreement.
(2) Employers are required to abide by oral statements made by their representatives as if they were written statements contained in a collective bargaining agreement.
(3) Employers are required to act in good faith and not discharge an employee when the discharge would have the effect of destroying the employee's right to receive the basic benefits of the employment agreement.[53]

A California court has concluded that handbook provisions outlining probationary periods and allowing for termination "if your overall performance is unsatisfactory" constitutes an "implied

50. *See generally* Note, *Protecting At-Will Employees Against Wrongful Discharge; The Duty to Terminate Only in Good Faith,* 93 HARV. L. REV. 1816 (1980).

51. *See, e.g.,* CAL. LAB. CODE § 2922 (West 1971).

52. Walker v. Northern San Diego County Hosp. Dist., 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982). *See also* Wooley v. Hoffmann LaRoche, *supra* note 39.

53. Williams, *Fire At Will,* PERSONNEL JOURNAL 74 (June 1985).

in fact" promise of future employment terminable only for cause.[54] Thus, in drafting handbook provisions, employers must take into account whether certain policies will modify the employer's unfettered right to discharge an employee.

Oral statements also can impose a "just cause" standard on employment. If a recruiter states at the time of hire that an employee will be terminated only for cause, the employee may have a claim against the company if he is discharged for other than just cause.[55]

Post-hiring events, such as promotions and commendations, also may give rise to an implied promise that an employer will not discharge employees arbitrarily. Factors considered by the courts include the employee's length, continuity and quality of service.[56]

There are also public policy exceptions which have developed to the at-will doctrine. Cases have shown that employees may not be discharged for refusing to participate in illegal price fixing;[57] for refusing to commit perjury;[58] for attempting to correct violations of law;[59] or even for attempting to obtain a smoke-free environment.

Employers can insulate themselves from liability under certain at-will exceptions through proper management training and review of employment documents. However, a careful weighing of the pros and cons of adopting at-will policies should be undertaken. A caveat in an application, for example, stating that employment can be terminated at any time may have a negative impact on employee relations, as employees may be hesitant to join a company that makes it clear that employees are subject to discharge for any or no reason. Nevertheless, many employers have found it advisable to include a statement similar to the following in their job application forms:

> I have this day received a copy of the company handbook. I understand that the rules, policies and benefits contained in the handbook may be changed, modified or deleted at any time. I agree to abide by the rules and regulations contained in the handbook and with the revisions made thereafter. I also understand

54. Alvarez v. Dart Industries Inc., 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976).

55. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employee who was discharged had worked for 3 years, received commendations and promotions, and received no criticism of his work).

56. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal Rptr. 839 (1980).

57. Petermann v. International Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

58. Crossen v. Formost McKesson, Inc., 537 F. Supp. 1076 (N.D. Cal. 1982).

59. Henzel v. The Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr 159 (1982).

> that any delay or failure by the Company to enforce any Company policy or rule will not constitute a waiver of the Company's right to do so in the future. I understand that neither this handbook nor any other communication by a management representative is intended to in any way create a contract of permanent employment, and that employment can be terminated by either party for any reason at any time.

Particularly in a high-tech company, where massive layoffs have occurred in the past few years, it is advisable to include appropriate disclaimers in employment forms.

VII. THE FINAL PHASE: SUSTAINING THE POSITIVE ATMOSPHERE THROUGH THICK AND THIN

From this brief overview, it should be evident that there are numerous employee relations considerations which must be addressed before a new business is started. Even if the employer initially dedicates himself to good labor relations, it is important to sustain this initial enthusiasm throughout the company's growth and development. Whether or not union-free status is of paramount concern to a particular employer, employee relations should be given the utmost attention. Poor employee relations inevitably leads to poor company performance. Further, there will be many difficult problems to overcome, particularly in the beginning. If employees are working with you, it is easier to overcome each hurdle and react rapidly to changes in the business. Therefore, anticipation of employees' needs is essential to the conduct of a profitable business. Those needs must be given careful consideration when they will have the greatest impact, at the beginning.